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January 19, 2000

BY HAND DELIVERY

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A306
Washington, D.C. 20554

Re: In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98

Dear Ms. Salas:

Enclosed for filing are an original and twelve copies of the Comments of SBC Communications Inc. in the above-captioned matter.

Please have one copy date-stamped and returned to me. If you have any questions, please call met at 202-326-7969. Thank you for your assistance in this matter.

Sincerely,

Rachel E. Barkow

REB/sls
Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
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	)	

COMMENTS OF SBC COMMUNICATIONS INC.

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January 19, 2000

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The Commission can and must conclude that ILECs need not provide unbundled loops, transport, or combinations thereof when those facilities would be used predominantly as substitutes for special access services used in conjunction with interexchange services ("traditional special access services") or interLATA private line services. That is, SBC asks the Commission to limit the availability of UNEs in situations in which the facilities are *not* used predominantly for local or xDSL services.

The Commission has ample legal authority to impose this limitation. Indeed, the Commission has five separate sources of such authority, two of which do not require a use restriction on UNEs. As a threshold matter, section 251(d)(2) requires the Commission to address whether carriers are impaired without access to UNEs to displace traditional special access and private line services. In addition, even if the impairment test is satisfied, the Commission has determined that it may limit access to UNEs under section 251(d)(2) in order to fulfill the goals of the 1996 Act, which include the promotion of facilities-based competition and deregulation. Aside from these two sources of authority to restrict the *availability* of UNEs, there are three sources of statutory authority upon which the Commission can rely to restrict the *use* of UNEs. Section 251(c)(3) permits the Commission to impose "just, reasonable, and nondiscriminatory" conditions on UNEs. Section 251(g) vests authority in the Commission to impose use restrictions to protect the access charge regime. And section 4(i) gives the Commission broad power to further the goals of the Act.

The Commission does not merely have the *authority* to prevent the elimination through the back door of its access charge regime; it has a legal *obligation* to limit access to unbundled loops, transport, or combinations thereof when those facilities would be used predominantly as

substitutes for traditional special access or intraLATA private line services. As an initial matter, requesting carriers are not impaired in their ability to provide traditional special access or private line services without access to UNEs. Competition in special access services predated the 1996 Act by 12 years. Today, more than 100 competitive access providers have entered the special access/private line market, and it is estimated that they now account for one third of all special access/private line revenue. Indeed, their revenues are growing at a pace that far outclips those of the Bell companies and GTE. Under the circumstances, the Commission cannot conclude that carriers are impaired in their ability to provide or obtain traditional special access/private line services without using UNEs.

Even if the Commission were somehow to conclude that carriers are impaired in their ability to provide traditional special access/private line services without UNEs, the Commission's *UNE Remand* analysis dictates that UNEs *not* be available to displace traditional special access/private line services. In the *UNE Remand Order*, the Commission held that it may consider factors other than the "necessary" and "impair" standards in establishing unbundling obligations under section 251(d)(2), and that it may decline to order unbundling based on such factors, even under circumstances in which the impairment test is met. Among the factors the Commission identified were: (1) the impact of unbundling on competition, in particular facilities-based competition; and (2) the extent to which unbundling would be consistent with Congress's goal of establishing a pro-competitive deregulatory framework. The Commission already relied on the first of these factors in declining to require unbundling of packet switching.

Given the disparity between UNE rates and market rates, any decision to displace traditional special access/private line services with UNEs would have a devastating effect on competition for those services. While IXCs might continue to use the special access facilities of their affiliates where those facilities are in place, they would have little incentive to deploy any additional facilities. Moreover, CLECs that are not affiliated with major interexchange carriers – many of which derive a significant portion of their revenues from special access services – would effectively be forced out of the special access/private line marketplace. They could not possibly compete with ILEC UNE rates that are 50% below market rates. Thus allowing UNEs to displace special access services would effectively kill competition in the market arena in which it is most advanced and growing most rapidly.

Allowing UNEs to displace traditional special access also would be inconsistent with Congress's deregulatory goals, and the Commission's own stated preference for market-based rates whenever possible. Just 18 days before adoption of the *UNE Remand Order*, the Commission established a deregulatory framework for ILEC special access services to reflect the high level of competition for those services. That order would be rendered completely pointless if the Commission allows special access services to be converted to UNEs. Far from promoting a deregulatory framework, the Commission would be taking a giant step backward to the days preceding price cap regulation when ILEC rates were based on cost studies and rate of return regulation.

Allowing carriers to substitute UNEs for special access and private line services would also subject ILECs to an immediate and dramatic loss of revenues. Irrespective of whether

special access services house universal service subsidies *per se*, it is an inescapable reality that the revenues from this service help finance low-cost consumer rates – for example, by contributing to the recovery of an ILEC's overall overhead, which is excluded from TELRIC rates. Moreover, any sharp reduction in the price of special access will concomitantly lower the point at which carriers decide to use special access in place of switched access, resulting in the conversion of switched access services that indisputably house universal service subsidies. A reduction in these subsidies would be inconsistent with the goals of the Act and with sound public policy.

Because of the threat to public policy that UNE bypass of special access and private line would create, the Commission has the authority to impose either an availability limitation under section 251(d)(2) or a use restriction under sections 251(c), 251(g), or 4(i). Section 251(c)(3) expressly permits incumbent LECs to impose "just, reasonable, and nondiscriminatory" conditions on the use and availability of UNEs. In light of the policy considerations discussed above, a restriction that precludes UNEs from supplanting traditional special access and private line services would clearly be just, reasonable, and nondiscriminatory. Section 251(g) expressly provides that the local competition provisions of section 251 shall not displace the access charge regime unless and until the Commission explicitly so holds. Because UNE bypass of special access/private line services would effectively displace the access charge regime, the Commission can and must restrict such bypass under section 251(g). Section 4(i) gives the Commission broad authority to undertake any and all actions, not inconsistent with the Act, as may be necessary in the execution of its functions. Because nothing in the Act prohibits restrictions on UNEs, the

Commission could, pursuant to section 4(i), reasonably impose conditions on UNEs that prevent special access bypass in order to promote facilities-based competition, a deregulatory policy framework, universal service, or any other goal of the Act.

The Commission should hold further that requesting carriers may not use switch/transport combinations solely as a substitute for switched access. Access bypass in this context would decimate switched access revenues and, in turn, universal service. The Commission has not yet established universal service funding mechanisms to recover subsidies that are now embedded in switched access rates. Until such time, it would be wholly inappropriate for the Commission to allow the conversion of switched access services to UNEs. The Commission should insist on a local service requirement also to remain consistent with its definition of local switching. Because carriers purchasing unbundled local switching obtain "all switching features . . . on a per-line basis," they cannot provide switched access services for a particular telephone line unless they also handle all local traffic carried over that line. Nor are they impaired in their ability to provide the dedicated portion of a switched transport circuit without UNEs. Rather, those facilities, like the dedicated transport facilities used for special access service, are already subject to significant competition.

In short, whichever approach the Commission takes – whether it restricts the *availability* or the *use* of UNEs and UNE combinations – the Commission should prevent UNEs from being used primarily as a means of access bypass.

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COMMENTS OF SBC COMMUNICATIONS INC.

I. Introduction.

SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell, Nevada Bell, the Southern New England Telephone Company, and Ameritech Corporation (collectively "SBC") respectfully submit these comments in response to the Commission's *Fourth Further Notice of Proposed Rulemaking* and *Supplemental Order* in this docket.[1]

The Commission's *Fourth FNPRM* and *Supplemental Order* ask whether the Commission can and should permit incumbent local exchange carriers (ILECs) to decline to allow unbundled network elements (UNEs) to displace special access services.[2] The Commission also inquires "whether requesting carriers may use unbundled dedicated or shared transport facilities in conjunction with unbundled switching to originate or terminate interstate

[1] *See* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) (*"UNE Remand Order"* and *"Fourth FNPRM,"* respectively); Supplemental Order, *Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-370 (rel. Nov. 24, 1999) (*"Supplemental Order"*).

[2] *Supplemental Order* ¶ 6.

toll traffic to customers to whom the requesting carrier does not provide local exchange service."[3]

As discussed below, the Commission should hold that ILECs need not provide unbundled loops, transport, or combinations thereof when those facilities would be used predominantly as substitutes for special access services used in conjunction with interexchange services ("traditional special access services") or intraLATA private line services.[4] SBC does not here ask the Commission to restrict the availability of loop and transport facilities used predominantly for the provision of local or xDSL services. Although SBC has argued that competitive local exchange carriers (CLECs) do not need unbundled loops and transport at all in some geographic areas, the Commission rejected this argument, and SBC does not here ask the Commission to revisit that decision. Rather, SBC merely asks the Commission to limit the availability of UNEs in situations in which the facilities are *not* used predominantly for local or xDSL services.

The Commission has ample legal authority to implement this proposal. Indeed, the Commission has five separate sources of such authority, two of which do not require use restrictions on UNEs at all. As a threshold matter, section 251(d)(2) requires the Commission to address whether carriers are impaired without access to UNEs to displace traditional special access and private line services. In addition, even if the impairment test is satisfied, the Commission has determined that it may limit access to UNEs under section 251(d)(2) in order to

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[3] *Fourth FNPRM* ¶ 496.

[4] SBC includes intraLATA private line, as well as special access services in its analysis because both are provided under the same market conditions. The facilities used by CLECs for special access services can likewise be used for intraLATA private line services and they, in fact, are so used. In addition, private line services, like special access services, are purchased exclusively by the largest end users. Indeed, special access is at its core nothing more than a particular type of intraLATA private line service – one that connects to another private line service at its point of termination. Analytically, there is little basis for distinguishing this service from special access. And, in fact, the Commission itself has treated special access and private line service as a single category. *See* Peter W. Huber & Evan T. Leo, Special Access Fact Report (submitted by USTA on behalf of Bell Atlantic, BellSouth, GTE, SBC, U S WEST) at 5 (FCC filed Jan. 19, 2000) ("*Special Access Report*").

fulfill the goals of the 1996 Act, which include the promotion of facilities-based competition and deregulation. Aside from these two sources of authority to restrict the *availability* of UNEs, the Commission has three sources of statutory authority upon which it can restrict the *use* of UNEs. Section 251(c)(3) permits the Commission to impose "just, reasonable, and nondiscriminatory" conditions on UNEs. Section 251(g) vests authority in the Commission to impose use restrictions to protect the access charge regime. And section 4(i) gives the Commission broad power to further the goals of the Act.

Not only does the Commission have the *authority* to prevent the elimination through the back door of its access charge regime, it has a legal *obligation* to do so. First, carriers are not impaired under section 251(d)(2) in their ability to provide traditional special access or private line services without access to UNEs. Today, more than 100 CLECs provide these services, and these carriers already account for one third of all special access and intraLATA private line revenues.

Second, impairment aside, restricting the availability of UNEs would further the goals of the Act. Over the past sixteen years, CLECs have deployed significant amounts of fiber that they use to provide special access and private line services. If the Commission allows UNEs to displace these services, further deployment of competitive facilities will cease. In addition, the dozens of CLECs that derive substantial revenue from the provision of special access and private line services will find themselves facing a severe revenue hit. Stated simply, no interexchange carrier will use the facilities of a CLEC with which they are not affiliated if they can obtain, instead, UNEs at a 50% discount from prevailing market rates.

Of course, CLECs would not be alone in experiencing significant rate shock. ILECs would collectively lose [REDACTED] dollars of revenue each year – dollars that help finance affordable, ubiquitous local service and investment in advanced services. Significantly, little or none of this money would find its way into the pockets of average consumers. To the contrary, the arbitrage opportunity created by conversion of traditional special access and private line services to UNEs would benefit interexchange carriers and large businesses at the expense of consumers. This is hardly what Congress had in mind when it enacted the 1996 Act.

Allowing the displacement of traditional special access and private line service by UNEs would also be directly at odds with the deregulatory goals of the Act. In effect, any such decision would co-opt the market in favor of regulatorily prescribed TELRIC rates. Moreover, it would do so, ironically, despite the fact that just 18 days prior to adoption of the *UNE Remand Order,* the Commission – in recognition of the advanced state of competition in special access services – established a deregulatory framework specifically for that market.

The Commission also should place a limit on access to UNEs to replace switched access. The Commission has not yet established universal service funding mechanisms to recover the subsidies that are now embedded in switched access rates. Until such time, it would be inappropriate for the Commission to allow requesting carriers to use switch/transport UNE combinations solely as a substitute for switched access, because doing so would decimate switched access revenues and the universal service they support. Moreover, because carriers purchasing unbundled local switching obtain "all switching features . . . on a per-line basis," they cannot, consistent with the Commission's definition, provide switched access services for a

particular telephone line unless they also handle all local traffic carried over that line. Nor are they impaired in their ability to provide the dedicated portion of a switched transport circuit without UNEs. Rather, those facilities, like the dedicated transport facilities used for special access service, are already subject to significant competition.

In short, the Commission can and must use its authority under the Act to restrict access to UNEs when carriers seek them solely to bypass access charges. Whether the Commission imposes an availability limitation under section 251(d)(2) or a use restriction under sections 251(c)(3), 251(g), or 4(i), the end result must be the same: carriers must not be permitted access to UNEs in order to replace traditional special access and private line services or switched access. Rather, carriers seeking access to UNEs to bypass the access charge regime for a customer must, at a minimum, use those UNEs predominantly for the provision of local or xDSL services to that customer. This comports with the impairment standard of section 251(d)(2), and the goals of the Act, which the Commission may enforce under section 251(d)(2), section 251(c)(3), section 251(g), and section 4(i).

II. ILECs Should Not Be Required To Provide Loops and/or Dedicated Transport Facilities as UNEs When Those Facilities Are Used Predominantly To Provide Traditional Special Access or Private Line Services.

As noted, the Commission seeks comment on "whether there is any basis in the statute or our rules" under which incumbent LECs could decline to provide UNEs to displace traditional special access services. There are, in fact, no less than five such bases: (1) the section 251(d)(2) "impairment" test; (2) the Commission's authority under section 251(d)(2) to decline to require unbundling in situations in which unbundling would be contrary to the goals of the Act; (3)

section 251(c)(3), which permits restrictions on UNEs that are "just, reasonable, and nondiscriminatory"; (4) section 251(g), which provides that, notwithstanding the provisions of section 251, access services shall be priced at access rates unless and until the Commission expressly decides otherwise; and (5) section 4(i), which gives the Commission broad authority to pursue its statutory mandate.

We will first address the Commission's authority under section 251(d)(2) to restrict the availability of UNEs. We will then discuss the Commission's power under sections 251(c)(3), 251(g), and 4(i) to mandate a use restriction.

A. Section 251(d)(2) Vests the Commission with the Authority – and the Obligation – To Restrict the *Availability* of Loops and/or Dedicated Transport as UNEs When Those Facilities Are Used Predominantly To Provide Traditional Special Access or Private Line Services.

Section 251(d)(2) provides that:

> In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether –
>
> (A) access to such network elements as are proprietary in nature is necessary; and
> (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

The Supreme Court has held that this provision is a meaningful limiting standard that must be applied at the threshold of any UNE inquiry. In addition, the Commission has concluded that, impairment aside, it possesses authority under section 251(d)(2) to decline to require unbundling in situations in which unbundling would be contrary to the goals of the Act.

Section 251(d)(2) therefore provides two grounds upon which the Commission should limit the availability of loops and/or dedicated transport as UNEs when those facilities are used to displace traditional special access or private line services.

1. Requesting Carriers Are Not Impaired Under Section 251(d)(2) in Their Ability To Provide Traditional Special Access or Private Line Services Without Access to UNEs.

a. In Its Impairment Analysis, The Commission Should Consider Traditional Special Access/Private Line Services as a Discrete Market Segment.

In the *UNE Remand Order*, the Commission concluded that, as a general matter, CLECs are impaired in their ability to provide the services they seek to offer without access to ILEC loops and interoffice transport. The Commission based this conclusion on its finding that alternative facilities were not sufficiently available to permit requesting carriers to provide ubiquitous local exchange or xDSL services without access to ILEC loops and dedicated transport.[5] The Commission did not address whether carriers are impaired in their ability to provide traditional special access services absent the availability of loops or loop/transport combinations, nor does its reasoning apply to such services. Instead, it broadly deferred issues relating to traditional special access to this proceeding.[6]

The impairment analysis that the Commission did not undertake in the *UNE Remand Order* is a threshold issue that the Commission must now address. Section 251(d)(2) by its very terms directs the Commission to consider whether lack of access to non-proprietary network elements would impair the ability of a telecommunications carrier requesting access to provide

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[5] *UNE Remand Order* ¶¶ 182-189, 340-346. SBC takes issue with the Commission's analysis of these elements but does not challenge those findings here.

[6] *See Supplemental Order* ¶ 6 (asking "whether there is *any* basis in the statute or our rules" under which ILECs could decline to provide special access services as unbundled network elements) (emphasis added).

the *"services"* it seeks to offer.[7] This language compels the Commission to consider in its impairment analysis significant differences among services, which might warrant a finding of impairment with respect to some, but not others.[8]

Indeed, the Commission already concluded as much in the *UNE Remand Order*. For example, noting that "end users may be much less tolerant of problems that affect data services, than they would be for voice service," the Commission held that, in determining whether a carrier would be impaired by a degradation in service quality, the Commission should consider "the type of service a competitor seeks to provide."[9] Similarly, emphasizing that section 251(d)(2) refers to the "*services* [a carrier] seeks to offer," and that "[d]ifferent types of customers use different services," the Commission concluded "it is appropriate for us to consider the particular types of customers that the carrier seeks to serve" in applying the impairment test.[10]

The Commission applied these principles in its analysis of circuit switching. After concluding initially that, as a general matter, carriers were impaired without access to ILEC

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[7] Strictly speaking, the Commission needs to undertake two separate impairment analyses. First, the Commission must consider whether interexchange carriers (IXCs) are impaired in their ability to provide interexchange private line services if they are denied access to unbundled network elements. Second, the Commission must determine whether competitive providers of traditional special access and private line services would be impaired in their ability to provide such services without access to UNEs. There can be no credible claim that interexchange carriers are impaired because they have been providing private line services profitably for many years using traditional ILEC special access services. Consequently, SBC focuses exclusively on the latter question in its impairment analysis.

[8] Indeed, a contrary reading would render the limiting standard in section 251(d)(2) meaningless. The Commission has already rejected the argument that the unbundling determination should be based on the needs of efficient carriers. *UNE Remand Order* ¶ 53. The Commission will not analyze the availability of alternatives "from the perspective of a carrier using any specific competitive strategy in a particular geographic market." *Id.* ¶ 65. If the Commission were to go even further and conclude that UNEs must be available for all services, without restriction, there would be little left of section 251(d)(2). Virtually *any* carrier could obtain access to a UNE for *any* purpose so long as one type of carrier is impaired without access for the one service that it seeks to provide. This outcome would flatly contradict the Supreme Court's command that the Commission adopt a meaningful limiting standard in section 251(d)(2). *See AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 734 (1999).

[9] *UNE Remand Order* ¶ 96.

[10] *Id.* ¶ 81 (emphasis in original).

circuit switches, the Commission went on to conduct a more refined market-specific analysis to distinguish situations in which, in the Commission's view, carriers were impaired from those in which they were not:

> To the extent the market shows that requesting carriers are not serving a market segment with self-provisioned switches, we find that this fact is probative evidence that for a discrete market segment requesting carriers are impaired without access to unbundled local circuit switching. Conversely, to the extent that the market shows that requesting carriers are generally providing service in particular situations with their own switches, we find this fact to be probative evidence that requesting carriers are not impaired without access to unbundled local circuit switching. The task before us is to develop an administratively simple rule that reflects marketplace developments and provides certainty to market participants. We seek to adopt a rule that serves as a reasonable proxy for when competitors are indeed impaired in their ability to provide the services they seek to offer.[11]

The Commission ultimately concluded that whether or not CLECs are impaired without access to ILEC circuit switching depends, in part, upon the use to which the switch is put. In particular, the Commission found that if ILECs make available the enhanced extended link (EEL) in density zone one offices within the top 50 metropolitan statistical areas, CLECs are not impaired in their ability to serve customers with four or more lines in those areas.

The Commission's circuit switching analysis is directly relevant to the issue presented here. Just as the Commission may restrict the availability of ILEC circuit switching in situations in which those switches will be used to serve customers with four or more lines, so too may the Commission restrict the use of loops and transport in situations in which those facilities are used predominantly for the provision of traditional special access or private line services. Conversely, just as the Commission may limit the availability of circuit switching to customers with three or

[11] *Id.* ¶ 276.

fewer lines, so too may the Commission limit the availability of unbundled loops and transport to situations in which those facilities are used predominantly in the provision of local or xDSL services. Thus, if the Commission concludes that CLECs are not impaired in their ability to provide traditional special access or private line services without access to UNEs, the Commission's switching analysis must inevitably drive the Commission to the conclusion that ILECs need not make UNEs available when those facilities are used predominantly for the provision of traditional special access or private line services. And, as shown below, the facts compel precisely that conclusion.

b. Requesting Carriers Are Not Impaired in Their Ability To Serve the Traditional Special Access/Private Line Market Segment Without Access to UNEs.

As the *Special Access/Private Line Report* makes clear, the traditional special access/private line market is distinct from transport generally. Competitive access providers began competing in the provision of special access/private line services more than a decade before the 1996 Act was passed. In the ensuing years, competitive access providers deployed thousands of miles of fiber throughout the country, providing direct connections between large end users and IXC points of presence.

By 1992, the Commission concluded that "competition [for high capacity special access/private line services] is already developing relatively rapidly in the urban markets."[12] At the same time, the Commission took steps to accelerate further the development of such competition. Specifically, the Commission required ILECs to provide collocation at ILEC end offices so that competitive access providers and large end users would be able to terminate their

[12] Report and Order and Notice of Proposed Rulemaking, *Expanded Interconnection With Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7453, ¶ 177 (1992).

special access facilities at those offices.[13] The Commission also provided ILECs with increased flexibility in pricing their special access services in recognition of the growth of special access competition.[14]

That was eight years ago. Today, competition is thriving. There are more than 100 carriers engaged in the provision of competitive access services, and both the revenue and market share of these carriers is increasing at an astounding pace. In 1995, competitive access providers earned approximately $500 million in special access/private line revenues; three years later their revenues had increased fivefold – to $2.5 billion. In 1999, competitive access provider revenue for special access and private line services is projected to have doubled again – to $5.7 billion.[15]

Corresponding to this explosive rise in revenue is the competitive access provider's growth in market share. By 1998, they earned 29% of the amount of special access and private line revenue earned by the Bell companies and GTE. In 1999, they are projected to have increased that market share to approximately 33% of *all* special access/private line revenue.[16] Thus, competitive access providers today enjoy a market share in special access and private line services that is comparable to MCI WorldCom's and Sprint's combined share of the long-distance market.

This kind of market success belies the notion that CLECs need access to UNEs in order to provide traditional special access/private line services. They are *already* competing without such access, with great success. The Commission recognized in the *UNE Remand Order* that

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[13] *Id.*

[14] *Id. See also id.* at 7454 n.412 ("[W]e deem DS1 and DS3 special access services to be subject to competition.").

[15] *See Special Access Report* at 6.

[16] *Id.*

"the marketplace [provides] the most persuasive evidence of the actual availability of alternatives as a practical, economic, and operational matter."[17] Thus, consistent with the Supreme Court's mandate that the Commission give substance to the "impair" standard of section 251(d)(2), the Commission must conclude that requesting carriers are not impaired in their ability to provide traditional special access and private line services without UNEs.

2. Even if the Impairment Test is Deemed To Have Been Met, the Commission Can and Should Use Its Authority Under Section 251(d)(2) To Restrict the Availability of Loops and Transport Facilities That Are Used Predominantly in the Provision of Traditional Special Access or Private Line Services.

Even if the Commission somehow finds that the impairment test is met for traditional special access and private line services, the Commission need not and should not require that UNEs be made available for such purposes. In the *UNE Remand Order*, the Commission concluded that "in addition to the 'necessary' and 'impair' standards, section 251(d)(2) permits us to consider other factors that are consistent with the objectives of the Act in making our unbundling determination."[18] Among the objectives of the Act that the Commission identified were the promotion of facilities-based competition and deregulation where market conditions warrant.[19]

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[17] *UNE Remand Order* ¶ 66.

[18] *Id.* ¶ 101.

[19] *Id.* ¶¶ 110-113. In considering the effect of unbundling on facilities-based investment, the Commission generally dismissed ILEC arguments that excessive unbundling deters facilities-based investment and found reasonable CLEC assertions that they plan to deploy alternative facilities as soon as it is technically and economically possible to do so. *Id.* The Commission's analysis of this issue, though, was overly simplistic. Of course, CLECs would prefer to use their facilities rather than ILEC facilities, *all things being equal*. But all things are not equal: if it is sufficiently cheaper for a CLEC to use UNEs rather than to construct its own facilities, it will use UNEs, even if it could compete viably in the marketplace with its own facilities. Like every other business decision, CLECs have to weigh *all* the factors, including the price differential between UNEs and their own facilities. Moreover, how much weight a CLEC accords to the value of using its own facilities undoubtedly depends upon the nature of the facility. When it comes to transport facilities – which are largely fungible – CLECs presumably accord less weight to the value of their own facilities than may be the case with other types of facilities, such as those housing network intelligence. *Cf. id.* ¶ 37 (concluding that it would give little weight to the proprietary nature of a network element if the "incumbent LEC cannot demonstrate that the information or

The Commission relied on the first of these factors in declining to require unbundling of packet switches. The Commission found that CLECs may be impaired in their provision of advanced services to residential and small business customers. At the same time, noting that advanced services providers "are actively deploying facilities used to provide advanced services" such as xDSL across the country,[20] the Commission concluded that, with limited exceptions, it would be imprudent to require ILECs to provide unbundled access to their packet switches:

> Despite the encouraging signs of investment in facilities used to provide advanced services described above, we are mindful that regulatory action should not alter the successful deployment of advanced services that has occurred to date. Our decision to decline to unbundle packet switching therefore reflects our concern that we not stifle burgeoning competition in the advanced service market. We are mindful that, in such a dynamic and evolving market, regulatory restraint on our part may be the most prudent course of action in order to further the Act's goal of encouraging facilities-based investment and innovation.[21]

Just as the unbundling of packet switches could jeopardize "burgeoning competition" in the advanced services market, so too would unbundling undermine the significant competition that already exists in the traditional special access/private line markets. For sixteen years, CLECs have been laying fiber so that they could provide a competitive special access/private line service to interexchange carriers and large end users. As of May 1999, 89% of the top 50 Metropolitan Statistical Areas (MSAs) were served by competitive fiber, and 47 of the top 50 were served by at least three competitive fiber networks.[22] Moreover, in most of these MSAs, additional construction is planned.

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functionality that it claims is proprietary differentiates its services from its competitors' services, or is otherwise competitively significant").

[20] *Id.* ¶ 306.

[21] *Id.* ¶ 316.

[22] *UNE Fact Report,* Prepared for Ameritech, Bell Atlantic, BellSouth, GTE, SBC, and U S WEST, attached to the Comments of the United States Telephone Association, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, Appendix B (FCC filed May 26, 1999).

If the Commission requires ILECs to provide special access/private line circuits at UNE rates, CLEC deployment of alternative facilities will grind to a screeching halt. In addition, new investment aside, CLECs that are already providing competitive special access and private line services would find themselves with stranded capacity and confront significant revenue losses.[23] Dozens of CLECs currently derive a significant portion of their revenues from special access and private line services. The *Special Access Report* identifies more than 40 CLECs that derive ten percent or more of their revenues from these services, and there are undoubtedly others.[24] TELRIC prices, though, for loop/transport combinations are, on average, about 50% lower than the market price for corresponding special access and private line services. Facilities-based CLECs simply will not be able to compete against that kind of discount. Given a choice, interexchange carriers and large end users will opt for the cheaper UNE rates every time.[25] That is why the General Services Administration, to name one example, is so eager for the Commission to allow UNE arbitrage of special access and private line rates.[26]

A Commission decision to make available special access and private line services at UNE rates would carry a special irony. For years, the Commission's rules have *precluded* incumbent LECs from discounting their special access services too heavily under the theory that such discounts would be anticompetitive and predatory and would stifle competition in these services. Indeed, the overwhelming focus of the *Pricing Flexibility Order* – issued just 18 days before the

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[23] *See* Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, CC Docket Nos. 96-262, *et. al.*, FCC 99-206, ¶ 79 (rel. Aug. 27. 1999) ("*Pricing Flexibility Order*") (explaining that special access facilities are sunk investments).

[24] *Special Access Report,* Appendix A.

[25] While end users may not directly purchase UNEs, large end users can obtain steep discounts off their existing services by purchasing their special access and private line services from carriers that use UNEs as inputs.

[26] Comments of the General Services Administration, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (FCC filed Jan. 12, 2000) ("GSA Comments").

UNE Remand Order was adopted – was whether ILECs would be able to use their increased pricing flexibility to lower rates too much. A Commission decision that effectively re-prices ILEC special access and private line services at TELRIC rates would thus represent a departure from 16 years of Commission policy and a betrayal of the CLECs who relied on that policy as they invested in competitive fiber networks.

Worse yet, it would do *nothing* to promote the interests of most consumers. Traditional special access and private line services are purchased by and on behalf of the largest end users – those who have enough traffic to use dedicated circuits. A decision to allow UNEs to displace special access and private line services would thus result in nothing more than a massive diversion of revenues from ILECs and facilities-based CLECs to large businesses and IXCs. It is difficult to see how that result furthers or reflects the goals of the 1996 Act.

Indeed, if anything, traditional special access/private line conversions would affirmatively *harm* most consumers. Irrespective of whether special access rates continue to harbor universal service subsidies,[27] it is indisputably the case that the revenues derived from these services help to finance the low cost basic service rates that are enjoyed by consumers throughout the country. At a minimum, special access revenues contribute to the recovery of overhead that is expressly excluded from TELRIC rates. If special access services are re-priced at TELRIC, the consumers who continue to purchase basic telephone service from the ILEC will be left holding the bag for these costs. That – particularly coupled with the *other* cream skimming opportunities that are available to new entrants – will necessarily place significant pressure on basic local rates. It would also reduce the funds available for investment in

[27] The Commission is looking at this issue in the *Universal Service Proceeding* and has not yet made a determination.

advanced technology, particularly in less dense areas, where the business justifications for such investment is marginal.

Moreover, any sharp reduction in the price of traditional special access will concomitantly lower the point at which carriers decide to use special access in place of switched access, resulting in the conversion to UNEs of switched access services. And switched access service indisputably houses universal service subsidies. It is difficult to estimate precisely how much switched access revenue would be lost to UNEs in the event special access became available at UNE rates. But a 1993 study cited by the Commission in the *Expanded Interconnection* proceeding suggests that, at that time, a 50% decrease in the price of special access relative to switched access would result in a 17% decrease in the proportion of switched to special access demanded by AT&T and a 10.5% decrease for other interexchange carriers.[28] This substitution – UNE-based special access in place of switched access – would directly reduce universal service support and further erode the base of revenues upon which ILECs rely to maintain universal, affordable consumer service.

Even excluding this switched access substitution, the availability of traditional special access and private line services at TELRIC rates would result in a [REDACTED] interstate revenue hit to the Bell companies and GTE in the first year alone; they stand to lose approximately [REDACTED] in interstate revenues the second year.[29] No other unbundling requirement the Commission has adopted has had such an immediate and dramatic impact. In other contexts, where carriers must win the customer in order to take advantage of cheap UNE rates, incumbent LECs face a gradual erosion of revenues, as competitors build their customer

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[28] *Special Access Report* at 14-15.

[29] *Id.* at 13 & Table 8. This loss would be compounded, moreover, by corresponding losses in intrastate revenues. *See id.*

bases. That loss may be offset partially by an overall increase in demand over that period of time. Here, in contrast, interexchange carriers would effectively be able to convert the majority of their special access traffic almost immediately, resulting in severe rate shock to incumbent LECs. To be sure, some interexchange carriers would be constrained in making conversions by term contract commitments, but, as a general proposition, the penalties for early termination of such arrangements are mild. Indeed, the [REDACTED] interstate revenue loss in the first two years mentioned above takes full account of the early termination penalties under existing long-term arrangements.[30] It assumes that a carrier will not convert its special access circuits to UNEs when the termination penalties exceed the savings that could be gained over the life of the contract. Likewise, for contracts in which the penalties are smaller than the savings that would be gained by conversion, it assumes a conversion but offsets the revenue loss by the amount of the penalty. This kind of rate shock – which stems not from consumer savings, but from a windfall to interexchange carriers and the largest users – could not have been what Congress had in mind when it enacted the 1996 Act.[31]

Finally, allowing the displacement of traditional special access and private line services by UNEs would be directly at odds with Congress's directive and the Commission's oft-stated

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[30] *Id.* at 13-14.

[31] The unbundling provisions were designed to promote competition in the provision of local services to end users, not to promote exchange access competition. *See, e.g.*, 141 Cong. Rec. S7887 (daily ed. June 7, 1995) (Congress required ILECs "to open and unbundle their local networks, to increase the likelihood that competition will develop for local telephone service") (statement of Sen. Pressler); 141 Cong. Rec. H8289 (daily ed. Aug. 2, 1995) (the unbundling requirements were based on what long distance carriers said they needed to provide "real competition in the local loop") (statement of Rep. Hastert); *Reno v. ACLU*, 521 U.S. 844, 857 (1997) (observing that the 1996 Act was "designed to promote competition in the local telephone service market"); *MCI Telecomms. Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315, 317 (7th Cir. 1999) (same). Competition in the exchange access market was already thriving by 1996. Congress was clearly aware of this competitive market when it passed the Act and there is nothing in the legislative history to indicate that Congress envisioned section 251(c)(3) to be used for access bypass.

desire to "deregulate where market conditions warrant."[32] As noted above, traditional special access and private line services have been subject to competition for 16 years. More than one hundred CLECs provide competitive special access/private line services. These competitors account for one third of all special access and private line revenues, and they are gaining market share rapidly – about ten points of market share in just the last year. Moreover, the Commission just established a deregulatory framework specifically for this market.[33] Given the Commission's avowed intent to establish a pro-competitive, deregulatory national policy framework, it would be baffling if the Commission now preempted the single-most competitive LEC market and its own deregulatory initiatives with a TELRIC rate prescription.

The Commission need not and should not countenance such a result. Even if the Commission somehow concludes that the impairment test is met for traditional special access/private line services, the Commission should hold that, to further the goals of the 1996 Act, incumbent LECs will not be required to make available UNE loops and transport facilities (and combinations thereof) that are used predominantly for traditional special access or private line services.

B. If the Commission Does Not Restrict the *Availability* of UNEs As Substitutes for Traditional Special Access and Private Line Services Under Section 251(d)(2), It Can and Should Restrict the *Use* of UNEs to That End.

Whether or not the Commission imposes a restriction on the *availability* of UNEs to displace traditional special access or private line services, it can and should restrict the *use* of

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[32] *UNE Remand Order* ¶ 113.

[33] *See Pricing Flexibility Order* ¶ 19 ("the variety of access services available on a competitive basis has increased significantly since the adoption of our price cap rules"). *See also id.* ¶ 21 ("market forces, as opposed to regulation, are more likely to compel LECs to establish efficient prices"); *id.* ¶ 26 ("Because our ultimate goal is to continue to foster competition and allow market forces to operate where they are present ...."); *id.* ¶¶ 59-66 (allowing ILECs to deaverage rates for access services in the trunking basket – including special access services – into 7 zones on the grounds that the increased flexibility to deaverage these rates enhances the efficiency of the market for those services).

UNEs. The Act unquestionably vests authority in the Commission to do so. Indeed, there are three independent bases of authority for a use restriction that prevents access bypass: section 251(c)(3), section 251(g), and section 4(i). And nothing in the Act, the Commission's rules, or the Commission's orders precludes the Commission from using its ample authority under the Act to impose a use restriction to further the Act's goals.

1. The Express Terms of Section 251(c)(3) Permit A Use Restriction That Is Just, Reasonable, and Nondiscriminatory.

Section 251(c)(3) establishes a general obligation to make UNEs available. But it does not give all competing carriers blanket access to unbundled network elements for any purpose without restriction, as some of the IXCs and CLECs suggest. To the contrary, the unbundling obligation in section 251(c)(3) is expressly limited. One qualification to section 251(c)(3), discussed in Part IIA, *supra*, is extraneous to it: as the Supreme Court recognized, section 251(d)(2) places a meaningful limit on the unbundling obligation in section 251(c)(3).[34] Another restriction is found within section 251(c)(3) itself. Section 251(c)(3) permits ILECs to impose conditions on the provision of UNEs that are "just, reasonable, and nondiscriminatory."[35] Thus, by its very terms, section 251(c)(3) makes clear that the ILECs' obligation to unbundle UNEs is not unqualified and that conditions – on use or otherwise – can be imposed as long as they are "just, reasonable, and nondiscriminatory."

Despite this clear language, interexchange carriers claim that section 251(c)(3) does not permit use restrictions but instead allows them to use UNEs to provide *any* telecommunications service. This argument fails for two reasons.

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[34] *See AT&T Corp.*, 119 S. Ct. at 736.

[35] 47 U.S.C. § 251(c)(3).

First, nothing in the language of section 251(c)(3) precludes use restrictions on UNEs. That section begins by stating who may receive UNEs: LECs must provide UNEs "to any requesting telecommunications carrier." The section goes on to state that UNEs must be provided to these carriers "for the provision of a telecommunications service." The IXCs read this latter clause as if Congress had said "any telecommunications service" or "all telecommunications services" without restrictions.[36] But Congress plainly did not say that. When Congress meant "any," it expressly said so, as it did in the previous clause, which employs "any" before "requesting telecommunications carrier." In contrast, Congress used "a" in the latter clause. When Congress uses different terms within a statute, it is presumed that Congress intended to establish different meanings for each word. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)); *Mississippi Poultry Ass'n, Inc. v. Madigan*, 992 F.2d 1359, 1364 (5th Cir. 1993) (agreeing with appellant that "[t]he use of different words or terms within a statute indicates that Congress intended to establish a different meaning for those words").

Moreover, Congress used the same basic formulation in section 251(c)(3) that it used in the interconnection provisions of section 251(c)(2), where it said that interconnection is available "for the transmission and routing of telephone exchange service and exchange access," and in section 251(b)(5), which requires reciprocal compensation "for the transport and termination of

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[36] *See, e.g.*, Letter from Robert W. Quinn, Jr. (AT&T) to Lawrence Strickling (FCC), August 19, 1999, Attachment at 4 (*"AT&T Ex Parte"*); Letter from Chuck Goldfarb (MCI WorldCom) to Larry Strickling (FCC), August 20, 1999, Attachment at 4 (*"MCI Ex Parte"*).

telecommunications." The Commission has consistently read these provisions as "impos[ing] limits" on the purposes for which a carrier may invoke the statutory arrangements.[37] For example, the Commission has stated that "section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area."[38] Thus, the FCC limited the terms "for the transport and termination of telecommunications" in section 251(b)(5) to local traffic even though the literal terms of section 251(b)(5) contain no such restriction. This reading is unchallenged.[39] It is clear, then, that this type of statutory formulation – which is the same formulation used in section 251(c)(3) – addresses the outer boundaries of what a requesting carrier may seek, not the terms and conditions under which the incumbent must provide facilities and services.

Second, even if section 251(c)(3) stated that UNEs may be used for the provision of "any" telecommunications service, as the IXCs incorrectly argue, the statute goes on to empower the Commission to establish conditions that are "just, reasonable, and nondiscriminatory." This provision precludes an argument that access must be provided without limit or qualification. The IXCs, however, consistently ignore this provision – and for good reason: it is fatal to their argument. This provision establishes that the question is not whether the Act authorizes incumbent LECs to impose conditions on the provision of a UNE as a general matter. It plainly does. Rather, the question is whether a particular condition proposed by the incumbent satisfies the "just, reasonable and nondiscriminatory" threshold.

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[37] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15595, ¶ 186 ("*Local Competition Order*"), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

[38] *Id.* at 16013, ¶ 1034.

[39] *See* Brief for FCC, *Bell Atlantic Tel. Cos. v. FCC*, No. 99-1094, at 7, 22 (D.C. Cir. filed July 22, 1999) ("FCC Reciprocal Compensation Brief").

The cramped view of Commission authority advanced by the IXCs is not only inconsistent with the text of section 251(c)(3), it also represents an unexplained departure from the statutory scheme as a whole. Congress vested virtually every important implementation decision in sections 251 and 252 with the Commission. It simply defies logic to suggest that, while the Commission has the authority to, *inter alia*, identify all network elements, decide which ones must be made available, and establish rules that govern their pricing, it simultaneously lacks the authority to establish reasonable and nondiscriminatory limits on their availability that further important public and statutory goals.

2. Section 251(g) Provides Independent Authority for a Use Restriction that Protects Access Charges.

In addition to the general power in section 251(c)(3) to impose just, reasonable, and nondiscriminatory conditions on the provision of UNEs, the Act also vests the Commission with specific authority to prevent UNEs from displacing the access charge regime.

Section 251(g) requires local exchange carriers to "provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (*including receipt of compensation*) that apply to such carrier on the date immediately preceding February 8, 1996" until the Commission explicitly rules otherwise.[40] Although the Commission has observed that this provision was adopted, in part, to protect IXCs' ability to obtain access services, the plain language of the provision makes clear that it protects the access charge regime more broadly. As the General Counsel of the Commission has noted,

[40] 47 U.S.C. § 251(g) (emphasis added).

by its terms, section 251(g) "provides that the existing regulatory regime regarding access provided to interexchange carriers and ISPs shall continue in effect until specifically superseded by subsequent regulations."[41]

The legislative history of the 1996 Act confirms what the unambiguous language makes clear: Congress did not intend for UNEs to displace access, but instead gave the Commission the authority to complete its access reform. As noted in the Senate Report: "The obligations and procedures prescribed in [section 251] do not apply to interconnection arrangements between local exchange carriers and telecommunications carriers under section 201 of the 1934 Act for the purpose of providing interexchange service, and nothing in [Section 251] is intended to affect the FCC's access charge rules."[42] And, as the Commission has explained, section 251(g) "provide[s] evidence of Congressional recognition of the potential tension between existing interconnection obligations, such as access charges, and the new methods of interconnection mandated by section 251."[43]

In fact, the Commission has already relied upon section 251(g) to protect the access charge regime. As noted above, the Commission rejected IXC arguments that terminating access constitutes "transport and termination" within the meaning of section 251(b)(5) and that, accordingly, IXCs should have the option of paying TELRIC-based reciprocal compensation instead of terminating access charges. Although section 251(b)(5), by its literal terms applies to "the transport and termination of *telecommunications*" without any express limitation to "*local* telecommunications," the Commission found that section 251(g) preserves its historic access

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[41] FCC Reciprocal Compensation Brief at 34 (citation omitted).

[42] *See* S. Rep. No. 104-23, at 19 (1995).

[43] *Local Competition Order*, 11 FCC Rcd at 15866-67, ¶ 726. In addition, section 251(i) expressly provides that "[n]othing in [section 251] shall be construed to limit or otherwise affect the Commission's authority under section 201." 47 U.S.C. § 251(i).

charge jurisdiction under section 201(b) of the Communications Act and accordingly, allows the Commission to interpret section 251(b)(5) in a way that protects the access charge regime.[44] Just as the Commission has authority under section 251(g) to prevent the reciprocal compensation provisions of the Act from displacing the access charge regime, so too, does the Commission have the authority to prevent the UNE provisions from being used to that end, especially given section 251(c)(3)'s express provision for just, reasonable, and nondiscriminatory limits.[45]

The Commission similarly relied on its authority under sections 251(g) when it imposed temporary access charges on carriers who purchase the local switch as a UNE and use that element to originate and terminate interstate traffic.[46] Although the IXCs challenged the Commission's authority to do so, the Eighth Circuit rejected their arguments, agreeing with the Commission that "[c]learly Congress did not intend that universal service should be adversely affected by the institution of cost-based rates."[47] The Commission may balance support for universal service against the UNE requirements and strike an appropriate compromise that would not allow carriers to bypass access charges through UNEs and disrupt the measured course the Commission deemed necessary to safeguard universal services. *See also Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 539 (8th Cir. 1998) (upholding the Commission's decision to impose residual per minute charges on originating, rather than terminating, access minutes because "[t]his transitional solution is a reasonable exercise of the Commission's discretionary authority to balance competing statutory goals"). Indeed, the court of appeals held that it was permissible

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[44] *Local Competition Order*, 11 FCC Rcd at 16017-18, ¶ 1044; *see also* FCC Reciprocal Compensation Brief at 16.

[45] FCC Reciprocal Compensation Brief at 16 (citing *Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068, 1073 (8th Cir. 1997), for the proposition that "sections 251 and 252 do not supplant the FCC's exchange access regime").

[46] *Local Competition Order*, 11 FCC Rcd at 15864-66, ¶¶ 721, 724.

[47] *Competitive Telecomms. Ass'n*, 117 F.3d at 1074.

for the Commission to go so far as to impose access charges on purchasers of UNEs, notwithstanding that "such charges on their face appear to violate the statute."[48] Use restrictions on loop/transport combinations would have the same permissible purpose as the transitional plan approved by the Eighth Circuit: the protection of universal service. And, unlike the transitional access charge plan, such limits would not be inconsistent with any express provision of the Act.

3. The Commission Has Broad Authority Under Section 4(i) To Further the Goals of the Act.

Section 4(i) of the Act gives the Commission still another ground for limiting the use of UNEs and/or UNE combinations. Pursuant to section 4(i), the Commission may "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."[49] This "broad power" has been deemed the "'necessary and proper clause'" of the Act.[50] The Commission enjoys both "wide ranging" authority under section 4(i) and "significant discretion to choose among a range of reasonable remedies" in order to advance the purposes of the Act.[51] "[T]he Commission's judgment regarding how the public interest is best served" is accorded substantial deference.[52] Indeed, "[t]he Commission does not have to show that it selected the only conceivably appropriate remedy in order to invoke its 4(i) powers."[53]

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[48] *Id.* at 1074-75.

[49] 47 U.S.C. § 154(i).

[50] *U S WEST, Inc. v. FCC*, 778 F.2d 23, 26 (D.C. Cir. 1985) (quoting *North American Telecomms. Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985)).

[51] *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1107-08 (D.C. Cir. 1987).

[52] *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981).

[53] *New England Tel. & Tel.*, 826 F.2d at 1108.

Because nothing in the Act prohibits restrictions on UNEs, the Commission could impose limits on UNEs pursuant to section 4(i) in order to promote competition, to prevent rate shock, or to further any other purpose of the 1996 Act.

4. Nothing in the Act, the Commission's Rules, or the Commission's Orders Prevents the Commission from Exercising Its Statutory Authority To Impose a Use Restriction.

The IXCs make much of the fact that the Commission concluded in the *Local Competition Order* that it was without statutory authority to establish use restrictions.[54] In particular, they point out that the Commission interpreted section 251(c)(3) to mean that carriers may use network elements "for the purpose of providing exchange access services to themselves in order to provide interexchange services to consumers."[55] They further emphasize that the Commission stated that incumbents "may not impose restrictions upon the uses to which requesting carriers put such network elements."[56] Finally, the IXCs note that the Commission promulgated regulations in reliance on this interpretation.[57] According to the IXCs, the Commission could not now reverse course because section 251(c)(3) "unambiguously grants any 'telecommunications carrier' the right to use any 'telecommunications service.'"[58]

This argument is meritless. First, as discussed above, section 251(c)(3) does not grant requesting carriers the right to use "any" telecommunications service without limit. The statute plainly provides ILECs the right to impose conditions, as long as those conditions pass the "just,

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[54] *See, e.g., AT&T Ex Parte*; *MCI Ex Parte*.

[55] *Local Competition Order*, 11 FCC Rcd at 15679, ¶ 356.

[56] *Id.* at 15514-15, ¶ 27.

[57] *See AT&T Ex Parte*, Attachment at 3 (citing Rules 51.307(c), 51.309(a), and 51.309(b)).

[58] *Id.* at 4; *see also* GSA Comments at 10-12.

reasonable, and nondiscriminatory" threshold. Thus, the statute does not unambiguously require ILECs to provide UNEs without limit as the IXCs claim.

Nor is the Commission bound by its prior determination in any respect. "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron U.S.A., Inc. v. Nat'l Resources Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984); *see also United Steelworkers v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993) ("An agency may alter its interpretation of substantive law so long as its new interpretation does not conflict with the statute, and so long as the agency supplies a 'reasoned analysis' for 'changing its course.'") (quoting *Motor Vehicles Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)); *Piney Mountain Cole Co. v. Mays*, 176 F.3d 753, 767 (4th Cir. 1999) ("An agency willing to study a statute and legislative history and, where appropriate, to amend its interpretation is more deserving of the respect and deference of the courts than an agency that foolishly stays on the wrong path merely because it is well worn.").

Second, the Commission should not rely on its analysis in the *Local Competition Order* because its conclusion rested on an erroneous view of section 251(c)(3). The Commission's analysis of use restrictions is discussed in paragraph 292 of the *Local Competition Order*:

> Under section 251(c)(3), incumbent LECs must provide access to "unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide" a telecommunications service. We agree with the Illinois Commission, the Texas Public Utility Counsel, and others that this language bars incumbent LECs from imposing limitations, restrictions, or requirements on requests for, or the sale or use of, unbundled elements that would impair the ability of requesting carriers to offer telecommunications services in the manner they intend.[59]

[59] 11 FCC Rcd at 15646-47, ¶ 292.

The Commission thus relied on the view of the Illinois Commission, the Texas Office of Public Utility Counsel, and others that believed that section 251(c)(3) defined the scope of the unbundling obligation and required unbundling wherever technically feasible.[60]

The Supreme Court, however, rejected this interpretation of section 251(c)(3). The Court agreed with the Eighth Circuit that the Commission's interpretation of section 251(c)(3) as "'impos[ing] on an incumbent LEC the duty to provide all network elements for which it is technically feasible to provide access'" was "undoubtedly wrong."[61] The Court held that the technical feasibility language of section 251(c)(3) says nothing about which elements must be unbundled or whether a use restriction is permissible. Rather, section 251(c)(3) indicates only "*where* unbundled access must occur."[62] Because the foundation for the Commission's analysis of use restrictions in the *Local Competition Order* was repudiated by the Supreme Court, the IXCs' reliance on that discussion is wholly inappropriate.

The IXCs' dependence on paragraph 356 of the *Local Competition Order* is similarly unavailing. The IXCs place great emphasis on the Commission's conclusion that UNEs may be used to provide telecommunications services and that exchange access constitutes one such service. This conclusion, however, says nothing about whether the Commission has the authority

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[60] *See* Comments of the Illinois Commerce Commission at 48-49 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (FCC filed May 16, 1999) ("Section 251(c)(3) does not place a limit on the nature of a request or the use of the network elements once acquired. The only requirement is that the access to the network element be at a technically feasible point."); Initial Comments of the Texas Office of Public Utility Counsel at 10, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (FCC filed May 16, 1996) ("[I]f a carrier (a competitor) requests a certain type of unbundling and if the carrier can make a minimal showing that it will indeed use the unbundled elements, then the request should constitute a demonstration that unbundling is required."). The Texas Office of Public Utility Counsel, however, appears to recognize that conditions can be placed on UNEs as long as they are just, reasonable, and nondiscriminatory: "Before the Commission allows certain types of restrictions on interconnection or unbundled elements, it should seriously consider the competitive impact of such conditions." *Id.* at 38.

[61] *AT&T Corp.*, 119 S. Ct. at 736.

[62] *Id.*

to impose just, reasonable, and nondiscriminatory restrictions on the use of UNEs, even for exchange access services. Section 251(c)(3) expressly permits such a restriction, and, as noted above, the Commission's statements to the contrary in the *Local Competition Order* rested on its misunderstanding of section 251(c)(3).

Even operating under this misimpression, the Commission concluded in the *Local Competition Order* that it has "discretion under the 1934 Act, as amended by the 1996 Act, to adopt a limited, transitional plan to address public policy concerns raised by the bypass of access charges via unbundled elements."[63] Although the Commission stated that it could not adopt its proposed solution on a long-term basis, the Commission presumably so concluded because the particular solution the Commission adopted was at odds with the pricing requirements of the Act. The Commission presumably would not have concluded that its plan had to be limited in duration had that plan been consistent with the Act, as would be the restrictions on the availability or use of UNEs to displace traditional special access and private line services. In any event, there is no reason why the same statutory authority – *i.e.,* sections 251(g) and 4(i) – that allows a temporary remedy could not also be used on a longer-term basis if necessary to protect the access charge regime. *Cf. Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 437 (5th Cir. 1999) ("[W]e defer to the agency's reasonable judgment about what will constitute 'sufficient' support during the transition period from one universal system to another").

In sum, even if the Commission does not restrict the *availability* of UNEs to displace traditional special access/private line service, it can and should restrict the use of UNEs for those purposes. As discussed above, such a restriction is necessary to promote facilities-based

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[63] 11 FCC Rcd at 15679, ¶ 356.

competition and deregulation, and to preserve the access charge regime. The Act plainly permits a use restriction that furthers these goals.

III. The Commission Should Not Permit Requesting Carriers To Use Switch/Transport Combinations as a Substitute for Switched Access.

Nothing has changed in the two years since the Commission first asked whether a requesting carrier should be permitted to use switch/transport combinations as a substitute for switched access services where that carrier does not also provide local exchange services to the end user. Now, as then, the answer is no.

Allowing requesting carriers to use UNEs as a substitute for switched access would result in an immediate and devastating reduction in ILECs' switched access revenues. Given a choice between paying switched access charges or much lower TELRIC rates for UNEs, the only economically rational choice for an interexchange carrier would be to use UNEs for all of its access traffic. The resulting reduction in switched access revenue effectively would eliminate a significant source of funding for universal service and low consumer local exchange rates.

The decrease in ILEC switched access revenues that would result from a flash cut conversion of switched access to UNEs cannot be overstated. This loss in revenues inevitably would create immense pressure on ILECs to raise local rates and/or scale back expenditures for universal service. Although the 1996 Act mandated the elimination of implicit subsidies for universal service support, in the *Access Charge Reform Order*, the Commission concluded that access charges could not immediately be driven to cost without threatening support for universal service.[64] The Commission therefore resolved not to eliminate the implicit universal support

[64] First Report and Order, *Access Charge Reform*, 12 FCC Rcd 15982 (1997), *aff'd, Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 539 (8th Cir. 1998).

mechanisms in access charges by regulatory fiat, but rather to rely on emerging competition in local telecommunications markets to rationalize the access charge rate structure and drive access rates to competitive levels.[65] As a consequence, ILECs' switched access charges continue to contain implicit subsidies that support universal service and help finance low cost basic service rates.

As the Commission recognized, permitting requesting carriers to convert their switched access services to UNEs on a flash cut basis would be "highly disruptive to business operations"[66] and would render moot the Commission's deliberately measured market-based approach to access charge reform.[67] ILECs could no longer rely on access charges to recover the costs of universal service or to help defray the costs of providing basic local telephone services. With no other means of recovery available, ILECs will be forced to look to consumers of basic local services to cover these costs.

Plainly, Congress did not intend this result when it enacted section 251.[68] The Commission should, therefore, reaffirm that a carrier may not use unbundled local switching (by itself, or in combination with unbundled transport) solely to provide interexchange service or switched access service to an interexchange carrier. Any other conclusion would be flatly inconsistent with the clear language and objectives of the 1996 Act and the Commission's implementing regulations.

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[65] *Id.* at 15986-89, ¶¶ 5-13.

[66] *Id.* at 16002, ¶ 46.

[67] *Id.* at 16002, ¶ 45 ("We acknowledge that a market-based approach under this scenario may take several years to drive costs to competitive levels.").

[68] 11 FCC Rcd at 15862, ¶ 715; *see also* S. Rep. No. 104-23, at 19 (1995) ("nothing in [section 251] is intended to affect the FCC's access charge rules"). Indeed, had Congress intended to permit requesting carriers to convert their existing switched access arrangements to UNEs, there would have been no need for the Commission to enact section 251(g), which, as discussed above, expressly preserves the existing access charge regime until superseded by Commission regulation.

Permitting requesting carriers to use switch/transport combinations solely as a substitute for switched access also would be at odds with the Commission's definition of local circuit switching. In the *Local Competition Order*, the Commission defined local switching to encompass line-side and trunk-side facilities plus "the features, functions, and capabilities of the switch,"[69] and stated that, when a requesting carrier purchases unbundled local switching, it obtains "all switching features in a single element *on a per-line basis*."[70] The Commission affirmed this definition in the *UNE Remand Order*.[71]

A practical consequence of this definition is that a requesting carrier cannot use unbundled local switching (either alone or in combination with other elements) to provide switched access to customers to whom it does not also provide local exchange service.[72] Because the unbundled switching element includes a line card dedicated to a particular customer line, a carrier that purchases unbundled local switching to serve an end user obtains exclusive use of the switch to provide all the features, functions and capabilities of the switch, including switching for local exchange and exchange access service, for that end user.[73] This means, as a practical matter, that a requesting carrier must provide whatever services are requested by the customer whose line connects to the line card and, therefore, cannot use unbundled local switching as a substitute for switched access for end users for whom that carrier does not also

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[69] 11 FCC Rcd at 15706, ¶ 412; *see also id.* App. B, at 16210.

[70] *Id.* at 15706, ¶ 412 (emphasis added).

[71] *UNE Remand Order* ¶ 244 ("We . . . find no reason to alter our current definition of local circuit switching."); *see also id.* at App. C, at 5.

[72] Order on Reconsideration, *Implementation of the Local Competition Provisions in the Telecommunications Act of* 1996, 11 FCC Rcd 13042, 13049, ¶ 12 (1996) ("*UNE Reconsideration Order*") ("Similarly, the *First Report and Order* defined the local switching element in a manner that includes dedicated facilities, thereby effectively precluding the requesting carrier from using unbundled switching to substitute for switched access services where the loop is used to provide both exchange access to the requesting carrier and local exchange service by the incumbent LEC.").

[73] *Id.* at 13048, ¶ 11.

provide local exchange service.[74] The Commission specifically acknowledged this constraint, holding that "a carrier that purchases an unbundled switching element will not be able to provide solely interexchange service or solely access service to an interexchange carrier."[75]

Having recently reaffirmed its definition of unbundled local switching in the *UNE Remand Order*,[76] the Commission must also reaffirm its conclusion that a carrier may not use unbundled local switching solely to provide interexchange service or switched access service to an interexchange carrier. Rather, it may provide those services only if it also uses the switch to provide local exchange service to the end user. And, if unbundled local switching cannot be so used, *a fortiori*, a requesting carrier cannot use dedicated or shared transport in conjunction with unbundled switching to originate or terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service. Any other conclusion, as the Commission recognized, would be flatly inconsistent with the Commission's conclusion in the *Local Competition Order* that a requesting carrier that purchases unbundled local switching obtains "all switching features . . . *on a per-line basis*."[77]

Moreover, a carrier is not impaired if it is denied access to UNEs to bypass switched access. In particular, a carrier is not impaired without unbundled access to dedicated transport from a tandem switch to the ILEC's serving wire center or entrance facilities. These facilities are the aspects of dedicated transport that are easiest for CLECs to provide because they contain

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[74] *Id.* at 13049, ¶ 13.

[75] *Id.*

[76] *UNE Remand Order* ¶ 244.

[77] *UNE Reconsideration Order*, 11 FCC Rcd at 13048, ¶ 11; *id.* at 13049, ¶ 13 (permitting requesting carriers to use switching solely to provide interexchange services or access service to an interexchange carrier "would be inconsistent with our statement in the *First Report and Order* that 'a competing provider orders the unbundled basic switching element *for a particular customer line*'").

the highest concentration of traffic.[78] As a consequence, these facilities, as discussed above and in the *Special Access Report*, are already subject to substantial competition. In fact, the Commission has concluded that entrance facilities are "where competitive entry has been greatest."[79] Thus, the Commission should not allow CLECs to obtain a combination of transport and switching to replace switched access because they are not impaired without such access.

Nevertheless, even if the Commission believes the impairment test is satisfied and blanket access (without a local service requirement) would comport with its definition of switching, it still has the authority and obligation to impose a limit in order to protect access charge revenues and universal service. As discussed above, Congress vested the Commission with ample authority in the Act to further the Act's goals. And surely the protection of access charges and universal service is at the core of the Act's purposes.

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[78] *Pricing Flexibility Order* ¶ 102.

[79] *Id.* ¶ 87.

CONCLUSION

The Commission can and should adopt a limiting standard to promote local competition and deregulation and to preserve the access charge regime and universal service.

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